

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 21**

DEL MONTE FRESH PRODUCE N.A., INC., and  
TSA SERVICES, INC., d/b/a TSA STAFFING<sup>1</sup>

Joint Employers

and

Case 21-RC-20780

FOOD, INDUSTRIAL, AND BEVERAGE WAREHOUSE,  
DRIVERS AND CLERICAL EMPLOYEES, TEAMSTERS  
LOCAL UNION NO. 630, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO<sup>2</sup>

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was conducted before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Joint Employers are, and each of them is, engaged in commerce within the meaning of the Act and it will

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<sup>1</sup> The name of each employer appears as stipulated at the hearing. Del Monte Fresh Produce N.A., Inc., will herein be called Del Monte. TSA Services, Inc., d/b/a TSA Staffing will herein be called TSA. The Petitioner amended its petition during the hearing to include TSA as a joint employer.

effectuate the purposes of the Act to assert jurisdiction herein.

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Joint Employers constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time tomato repackers employed at the 10730 Patterson Place, Santa Fee Springs, California facility; excluding all other employees, all other employees currently represented for the purposes of collective bargaining by Food, Industrial, and Beverage Warehouse, Drivers and Clerical Employees, Teamsters Local Union No. 630, International Brotherhood of Teamsters, AFL-CIO, guards, managers, Tomato Sales & Operations Manager, Tomato Repack Supervisor, and supervisors as defined in the Act.<sup>3</sup>

#### **ISSUES AND CONCLUSIONS**

Two issues are presented for resolution. The first issue concerns the identity of the employer that employs the employees who perform the tomato repack work, also herein

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<sup>2</sup> The name of the Petitioner appears as stipulated at the hearing.

<sup>3</sup> The unit description is consistent with the parties' stipulation.

referred to as the tomato repackers,<sup>4</sup> at the Del Monte facility in Santa Fe Springs, California. The Petitioner claims that Del Monte and TSA jointly employ the tomato repackers as joint employers. Del Monte claims that TSA is the sole employer of the tomato repackers. TSA takes no position with respect to whether Del Monte and TSA jointly employ the tomato repackers.

The second issue presented concerns the supervisory status of Jose Guzman and Armando Velazquez. Del Monte contends that Guzman and Velazquez are supervisors within the meaning of Section 2(11) of the Act and should not be included in the unit. The Petitioner claims that they are not supervisors within the meaning of Section 2(11) of the Act and should be included in the unit. TSA takes no position on whether Guzman and Velazquez are supervisors within the meaning of Section 2(11) of the Act.<sup>5</sup>

Based on the record in this case and the considerations noted below, it is concluded that the tomato repackers are jointly employed by TSA and Del Monte. The record does not clearly establish whether Guzman is or is not a supervisor within the meaning of Section 2(11) of the Act. The record does not establish that Velazquez is a supervisor as defined in the Section 2(11) of the Act.

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<sup>4</sup> Within the category of tomato repackers, there are sanitation and cleaning employees, quality assurance employees, and production employees.

<sup>5</sup> Del Monte argues that Guzman and Velazquez are solely employed by TSA, and contends that they are supervisors within the meaning of Section 2(11) of the Act with respect to their supervisory responsibilities over the tomato repackers at the Del Monte facility.

## **FACTS AND ANALYSIS**

### **A. The Employers' Operations**

Del Monte is a Florida corporation with a facility located in 10730 Patterson Place, Santa Fe Springs, California, the only facility involved herein. Del Monte is engaged in the business of warehousing, repacking, and distributing fresh produce.<sup>6</sup>

TSA is a California corporation with its principal offices located at 16840 Valley View, La Mirada, California. TSA is engaged in the business of supplying employees to commercial enterprises.

### **B. Employer Status**

#### **1. Facts Regarding Employer Status**

Del Monte started its tomato repack operation in November 2003 on a nominal basis.<sup>7</sup> Del Monte remodeled the portion of its facility where the tomato repack operation is currently located, in order to set up and expand the tomato repack operation.

TSA supplies workers to Del Monte to perform the repack operation work. No written contract exists between TSA and Del Monte and there is no common offices shared by TSA and Del Monte.

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<sup>6</sup> Del Monte's Santa Fe Springs facility is also known as the Los Angeles Distribution Center.

<sup>7</sup> The Petitioner represents a unit of warehouse employees at the Del Monte facility covered by a collective-bargaining agreement in effect from February 1, 2004, to January 31, 2007. There is no contention that the unit of warehouse employees should include the repack employees supplied by TSA. Cf. Oakwood Care Center, 343 NLRB No. 76 (November 19, 2004).

Moreover, TSA and Del Monte have no common ownership. Del Monte does not maintain any personnel files or records for any of the tomato repack employees, as they are all kept by TSA. The record discloses that TSA had no involvement in the remodeling of the Del Monte facility to accommodate the repack operation.

In addition to the cooler utilized in connection with the repack operation, Del Monte maintains some five other coolers that are used by Del Monte warehouse employees (who are represented by Petitioner), in accomplishing the packing and warehousing of fresh produce shipped to and out of the Los Angeles Distribution Center.

On October 1, 2003, Del Monte hired Jorge Chabolla to oversee the development of a tomato repack operation at the Los Angeles Distribution Center and to perform work in the tomato repack area. The record discloses that Chabolla had extensive prior experience in repacking tomatoes, as he had worked in similar operations for other employers. Initially, when the tomato repack operation was getting started at Del Monte, Chabolla performed all of the repack work. Beginning about November 2003, Del Monte obtained additional repack orders which necessitated that Del Monte obtain additional manpower to work with Chabolla. Thus, Del Monte verbally contracted with Staffing Advantage, which was the predecessor to TSA, to provide some three or four workers to assist Chabolla in the tomato repack operation.

During this development and expansion period, Chabolla directly supervised the work of the workers provided by Staffing

Advantage, directly overseeing their work, scheduling their hours, training them, and assigning them to specific tasks. During this same period, Del Monte continued to renovate and rebuild its physical plant to permit the expansion of its repack operation, and to conform to the health and sanitation standards attendant to a repack operation.

By January 2004, the facility was sufficiently refurbished, and Del Monte's tomato repack business had grown, so that Del Monte acquired additional manpower from the staffing agency, which now was known as TSA. Among those hired in January 2004 was Guzman, who had previously worked with Chabolla in repack operations for other employers. Thus, Guzman was designated by TSA to oversee the work of the other repack workers provided by TSA assigned to the Del Monte facility.

The record revealed that, due to their familiarity with each other and their prior work experiences in similar repack operations for other employers, Chabolla worked closely with Guzman to devise and structure the Del Monte repack operation. The renovation and expansion of the Del Monte repack operation continued through the remainder of 2004, so that at the time of the hearing, there were some 21 employees that were procured through TSA, including Guzman and Velazquez, performing the tomato repack work at the El Monte facility.

Walter Miller is the Del Monte general manager of the Los Angeles Distribution Center which is located in El Monte, California. He has general oversight over all operations at the facility, including the repack operation. Dominique De Franco is

Del Monte's sales and operations manager for tomatoes. Thus he is responsible for procuring orders from customers for all products that Del Monte ships out of the Los Angeles Distribution Center, including the repacked tomatoes. The record discloses that Del Monte maintains a general office area at the Los Angeles Distribution Center where Miller and De Franco maintain their offices away from the general working areas at the facility. TSA has established, for payroll purposes, a work week for the repack employees that runs from Monday through Sunday; while the Del Monte warehouse employees work a payroll schedule which runs from Saturday through Fridays. The Del Monte office personnel are paid on a work week that runs from Saturday through Friday.

Jorge Chabolla, as was noted above, was hired by Del Monte and continues to function as Del Monte's supervisor for the repack area. The record discloses that he begins his work day at 5:30 a.m., and that he utilizes an office which is directly adjacent to the repack area. His only duties for Del Monte are to insure that the repacking of tomatoes is accomplished in accord with customers' requirements; that the customers' orders are filled on time, and that the customers' specifications with regard to color, size, quality; and any other special orders, are met. In addition, Chabolla is responsible to insure that sufficient inventory is maintained in the tomato repack operation to fill the customers' orders. Moreover, Chabolla determines when additional personnel is needed from TSA to permit the filling of the repack orders. Thus, he determines the number of additional workers and the term for which they will be employed.

Because the operation is a repack operation, it is subject to health and sanitation standards established by the FDA and the Los Angeles County Health Department. Thus, Chabolla is also assigned to insure that the health and sanitation standards are maintained.

The record discloses that on or about March 15, 2004, TSA sent a written proposal of services to Del Monte. The proposal sets forth the oral agreement between Del Monte and TSA regarding the personnel that TSA was already providing to Del Monte. According to the proposal, TSA charges Del Monte a rate for each employee supplied, and TSA is responsible for payroll and paying wages to the tomato repackers. TSA pays the repack employees on a weekly basis.

The record reveals that Guzman, who begins his work day at 5 a.m., fills out the time sheets reflecting the time when the repack employees arrived at work. Thus, the repack employees do not punch a time clock. On his arrival at 5:30 a.m., Chabolla checks with Guzman so that he is aware if all of the repack employees have reported to work. If there is a tardiness issue involving repack workers, according to Chabolla, Guzman talks to the tomato repacker about the problem outside of Chabolla's presence.

Chabolla testified<sup>8</sup> that at the end of his work day, which usually lasts until about 2:30 p.m., he will prepare a list

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<sup>8</sup> Only Chabolla and Miller testified at the hearing. Neither Guzman or Velazquez testified.



and the sequence of the orders that are to be filled for the next day. Since Guzman has usually left the facility by this time, Chabolla leaves the orders for the following day, locked inside of his office. Then, when Guzman arrives at 5 a.m., he opens Chabolla's office with the key that he regularly carries, and sets the 5 a.m. group of employees to perform the work pursuant to Chabolla's noted orders.

Del Monte Tomato Sales and Operations Manager Dominique De Franco reviews and then approves the time sheets for the tomato repackers, and Del Monte General Manager Walter Miller thereafter will also review and approve the payment of the invoice from TSA. Del Monte plays no part in determining what benefits are given to the tomato repackers provided by TSA.

A representative of TSA visits the Del Monte facility on a weekly basis to distribute paychecks to the tomato repackers. The record disclosed instances in the past when paychecks were left with Chabolla for distribution to the repack employees in situations when the employee was not present at the time the checks were originally issued.

The record discloses that during the period when the repack operation was being developed and expanded by Del Monte, word-of-mouth apparently led employees, who had known Chabolla at other employer operations, to approach him at Del Monte seeking employment. Chabolla referred these individuals to TSA, explaining to them that all hiring was conducted by TSA. Chabolla did not provide any input or recommendation to TSA regarding the decision whether or not to hire any applicants.

The tomato repacking is performed at the Del Monte facility, in an area which is specifically designated for the tomato repack operation. Del Monte has designated a specific doorway and stairway which is to be used by repack workers on entry to the Del Monte facility. The designation, however, is not strictly enforced and there is no notice posted restricting the repack employees to that mode of entry.

The tomato repack work is accomplished by workers who wash, sort and pack tomatoes. The repack workers are divided into three groups: The first group consists of some 15 line employees, who perform the sorting, grading, washing, packing and wrapping of tomatoes. The line employees begin their work day at 5 a.m.

The second group, which reports to work at 5:30 a.m., is comprised of some three cleaning employees. Among these, one of the three is a full-time janitor, while the other two cleaning employees perform cleaning work for the first 2 hours of their shift, and the remainder of the time they work as line employees.

The third group, who report at 6 a.m., is composed of three quality assurance employees. Among the three, one performs quality-assurance work on a full-time basis, while the other two perform quality-assurance work for the first hour or hour and one-half of their shift, and then they join the line operation.

The record reveals that Chabolla devised the grouping of the employees into the three groups, and that he also determined the starting times for all of the workers. With regard to the determination as to which employee will accomplish

which work, the record discloses that Chabolla, in consultation with Guzman, determines which employees will perform the cleaning work, which employees will perform the quality-control work, and which employees will perform the line work. The record also discloses that among the line employees, there are different jobs which include sorting, grading of tomatoes, washing, packing and wrapping. Chabolla and Guzman jointly observe the work habits and skill of employees and they then determine the appropriate assignment for each employee based on their observations.

The record discloses that there is no set "quitting" time for the repack employees. Rather, according to Chabolla, the repack employees are required to continue working until the work is accomplished.

The record reveals that the repack work is a function of customers' orders. Thus, Del Monte Sales and Operations Manager De Franco is responsible for procuring orders from customers for the repacked tomatoes shipped by Del Monte. De Franco purchases the quantity and variety of tomatoes necessary to fill the particular orders submitted by customers. Once De Franco has secured an order from a customer, he then conveys that order to Chabolla.

Chabolla then is in charge of setting the schedule for the repack work, determining, inter alia, which order will be completed first; which order will follow, until all of the orders are completed. Chabolla testified that when some new repack employees have inquired as to the length of their work day, he uniformly has told them that there is no set quitting time; that

they will be required to work as the orders demand.

Chabolla also testified that during his work day, he will monitor the orders that are being worked-on, so as to insure that they are completed on time. Chabolla described that there have been instances when he determined that it was necessary to move employees from one aspect of the repack operation to another, so as to enhance the possibility of completing the order at the time specified by the customer's order. In this regard, he will tell Guzman that an employee needs to be moved from one operation to another and then he expects Guzman will do as he directs.

Most of the work in the repack operation is performed in conveyor lines with each line consisting of a different aspect of the operation. The work that needs to be accomplished is determined by the customers' orders. Thus, some tomatoes are merely washed, sorted and packed pursuant to the customer order's specifications; while other customers will specify color and/or quality of tomatoes; and yet other customers will require special packaging of their ordered tomatoes into small trays which are then wrapped with clear plastic wrap.

Whenever Chabolla sees a work-related issue that needs to be addressed, he informs Guzman about the issue and then Guzman addresses the issue. Sometimes, when Guzman is not present and/or when the issue cannot wait for Guzman, Chabolla directly tells the tomato repackers what to do to address the issue. Also, if Chabolla's superior, General Manager Walter Miller, sees an issue that needs to be addressed, he tells

Chabolla or De Franco, who would in turn tell Guzman about the issue for Guzman to address it.

When Guzman is absent from work, Velazquez takes over Guzman's responsibilities. However, the record does not disclose to what degree Velazquez takes over Guzman's responsibilities when Guzman is absent from work, nor does the record reveal any details of the responsibilities or areas of oversight that are assigned to Velazquez.

The tomato repackers arrive at the facility for work in three different groups and three different times - 5 a.m., 5:30 a.m., and 6 a.m. - and all groups work 8-hour shifts. Chabolla decided to have three groups, and Guzman is responsible for keeping track of the arrival times of the employees, but Chabolla also keeps track by asking Guzman if employees arrived on time. On occasion, Chabolla personally observes if employees arrive to work on time.

If a tomato repacker is having performance problems, Guzman is responsible for talking to the tomato repacker, and Chabolla is sometimes present when such a talk occurs. TSA is the entity that ultimately performs the act of terminating any tomato repackers that it supplies to Del Monte. However, the record discloses that Chabolla has authority to reject any employee provided by TSA for the repack operation if the worker has not sufficiently progressed.

The record discloses that within the first 2 months of Chabolla's employment at Del Monte, Chabolla took an

under- performing employee who had been provided by the manpower agency, to the then warehouse manager Peter Sess, and Sess told Chabolla to send the employee to human relations. The record also revealed that within 3 or 4 months before the Board hearing in this matter, Warehouse Manager Patrick Serna directed a tomato repack employee not to come back to work.<sup>9</sup> According to Chabolla, Guzman has directly dismissed tomato repackers without consulting Chabolla, and there have been other instances when Guzman first conferred with Chabolla before dismissing a repack worker.

Chabolla testified that he spends approximately a total of 2-1/2 hours in the tomato repack area each workday. The record does not disclose where Chabolla spends the remainder of his work day, but, as is noted above, he utilizes an office which is directly adjacent to the repack area.

The record discloses that new orders are secured by De Franco on a daily basis. As they are secured, he will convey the order to De Franco who may discuss the orders' specifications with Chabolla. Chabolla then discusses the orders with Guzman, sometimes adjusting the sequence in which the orders are to be filled, and as is noted above, sometimes adjusting the deployment of the repack employees among the various tasks that are required.

Guzman is employed by TSA, as is Velazquez. TSA pays Guzman and Velazquez by the hour, whereas Chabolla is paid a

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<sup>9</sup> The circumstances of this incident are not detailed in the record.

salary by Del Monte. TSA pays Guzman 82 cents per hour more than it pays Velazquez. Both Guzman and Velazquez usually work 9-hour days.

The record discloses that Guzman spends his entire day working among the repack workers, overseeing their work and completing the work orders provided by Chabolla. The record discloses that Guzman will operate the wrap machine as is needed to fulfill the work orders, and that he will also move the pallets of tomatoes from the cooler to the processing areas, utilizing a forklift and a pallet jack.

The record reveals that Del Monte operates its tomato repack area pursuant to "Good Manufacturing Processes" (GMPs). Chabolla testified that he obtained the GMPs from Del Monte, and that he oversees his operation to insure that all of the GMPs are followed. The GMPs, while not revealed entirely in the record, appear to consist of some 19 rules and regulations which include rules concerning behavior, work standards, cleanliness standards and safety standards. Chabolla requires that all repack employees follow the GMPs. Chabolla testified that when a new employee is sent by TSA to work in the repack operation, he personally meets with the new employee and goes over each of the 19 GMPs so as to make sure that the employee is aware of the rules and understands them. New tomato repack employees are trained by more senior repack employees selected by Guzman.

In his role as the repack supervisor, Chabolla conducts monthly safety meetings with the tomato repack group of employees. At these meetings, he will address any safety

concerns and he will review the 19 GMPs so as to remind them of the need to adhere to those rules and regulations.

## **2. Board Standards, Analysis and Conclusion Regarding Employer Status**

The Board, in La Gloria Oil and Gas Company, 337 NLRB 1120 (2002), at fn. 2, noted its standards to determine whether two entities are joint employers:

In order to establish that two otherwise separate entities operate jointly for the purposes of labor relations, there must be a showing that the two employers share or codetermine those matters governing the essential terms and conditions of employment. Riverside Nursing Home, 317 NLRB 881 (1995), and NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (3d. Cir. 1982). The employers must meaningfully affect matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction. TLI, Inc., 271 NLRB 798 (1984).

In cases where one entity provides the manpower for work at another entity's operation, the Board has found the relationship to be a joint employer relationship. Capitol EMI Music, 311 NLRB 997, 998 (1993) and M.B. Sturgis, 331 NLRB 1298 (2002).

For example, in Capitol EMI Music, an employment agency supplied temporary employees to a user-employer. The user-employer could effectively fire any or all the temporary employees by simply requesting the employment agency to remove them from the user-employer's premises. Although the two employers did not have common ownership or common financial control, the Board found that the two employers shared and codetermined essential terms and conditions of employment. While the user-employer directly supervised the employees and assigned



work, the supplying-employer controlled the wage rates of the temporary employees supplied to the user-employer.

In Gourmet Award Foods, Northeast, 336 NLRB 872 (2001), the Board agreed with a determination that a supplier employer and the supplied employer were joint employers. The supplier employer recruited and hired the temporary employees, determined their hourly wages, issued their paychecks, paid their workers' compensation and made other payroll deductions. The supplied employer, however, assigned work to the employees, provided day-to-day control through its own supervisors, and determined the employees' hours and work schedules, including overtime. Moreover, the supplied employer established labor relations policies applicable to the temporary employees and the supplied employer maintained authority to discipline the employees for poor performance or rules infractions.

In the present case, TSA provides the labor and provides Guzman to oversee the work performed by the tomato repackers. The record reveals that while Guzman is engaged in the hands-on oversight of the tomato repackers, Chabolla is in charge of the tomato repack operation. In this regard, Chabolla has directly fired tomato repack employees and has directed Guzman to fire other repack employees who were not performing their work to his specifications.

Chabolla also has the authority to, and has utilized that authority, to direct that repack employees correct their conduct and/or work performance. Chabolla has a direct role in the training of new tomato repack employees as he reviews the

GMPs with each of them, and then he oversees their adherence to these rules by conducting monthly safety meetings for them.

Chabolla devised the shifts and the grouping of employees for the tomato repack operation and determined the staggered start time for each shift. Chabolla also determines the hours that the repack employees will work, informing them that their work day will end in conformity with the completion of the customers' orders. Chabolla also establishes the sequence of the work that is to be performed and he then conveys this information to Guzman. Chabolla also determines if additional workers are required from TSA, and he has the authority to request the additional manpower as the orders demand.

In conference with Guzman, Chabolla selects and assigns employees to the various tasks within the tomato repack operation. The selections are made as a result of his and Guzman's observations of each employee's skill and work habits.

Chabolla's sole area of supervision is the tomato repack area and he utilizes an office adjacent to the area. Accordingly, he is present in the tomato repack area virtually all of his work day. He constantly reviews the progress of the work performed in the tomato repack area so as to insure timely completion of the customers' orders pursuant to their specifications. In this regard, on a regular basis, he adjusts the sequence of orders that are to be processed, and he adjusts the deployment of the tomato repack workers to enhance the capacity to complete the orders as specified.

Based on the above-noted considerations, it is

concluded that Del Monte and TSA are joint employers of the tomato repack employees that are the subject of the instant petition, in that they jointly and meaningfully affect matters relating to the employment of the joint employees. Thus, Del Monte meaningfully participates in the firing and discipline of the repack employees; sets the work schedules for the repack employees; establishes the work rules and regulations and provides training for new repack employees to insure compliance with the rules and regulations; and determines the daily work assignments and work hours. Gourmet Award Foods, Northeast, supra; Capitol EMI Music, supra. See also, Mayfield Holiday Inn, 335 NLRB 38 (2001) (Found joint employers as the supplied employer discharged, trained, disciplined and scheduled the work hours of the supplied employees); Holiday Inn City Center, 332 NLRB 1246, 1248 (2000) (Found joint employers where the supplied employer assigns, directs and oversees the daily work of the supplied employees).

Del Monte argues that under H&W Motor Express, 271 NLRB 466 (1984), a user employer's limited ability to request the supplier employer to remove an employee is not sufficient to create a joint employer relationship. However, in the case cited, that was not the only consideration relied upon by the Board based its decision. In H&W Motor Express, the supplier-employer's onsite supervisor, William Gofta, had the authority to:

"assign work and overtime; grant sick leave or time off; hire, discipline, suspend, and fire employees; and

his role to participate in grievance procedures, all stem from his capacity as a Lin Rol [supplier-employer] supervisor. Gofta reports to and checks with Lin Rol concerning employee employment matters. Gofta does not have to contact or gain permission from H&W [user-employer] to take action relating to labor relations.

Additionally, all of the Lin Rol employees received a Lin Rol booklet describing their terms and conditions of employment."

Id. at 468.

The record evidence in this proceeding does not show that Guzman or Velazquez, unlike Gofta, assign overtime, grant sick leave or time off, hire, discipline, suspend, and fire employees. The record also does not show that Guzman or Velazquez has any role in grievance procedures, or checks with TSA concerning employee employment matters. Further, the record shows that Guzman sometimes consults with Chabolla before dismissal of an employee, and that Chabolla is sometimes present when Guzman discusses performance problems with employees. There is also no evidence of a TSA booklet describing employees' terms and conditions of employment. The record in the current case shows that Del Monte has much more direct supervision of the tomato repackers through Chabolla than the user-employer did in H&W Motor Express.

A similar observation can be made about Del Monte's reliance on N.K. Parker Transport, 332 NLRB 547 (2000). In that case, the ability of the user-employer to discharge an employee provided by the supplier-employer was only one of many factors considered by the Board in finding a joint employer relationship. Relying on H&W Motor Express, 271 NLRB 466 (1984), Del Monte argues that an individual's obligation to comply with safety

requirements and standards is of lesser importance. As discussed above, the GMPs are more than safety requirements and standards. Record testimony reveals that violation of GMPs can result in rejection of product by a customer. Accordingly, Del Monte's contention is rejected.

Additionally, Del Monte's reliance on Airborne Freight Co., 338 NLRB No. 72 (2002), is inapposite and fails to accurately reflect that the Board only rejected Member Liebman's desire to revisit the standard for determining joint employer relationship. Thus, it fails to support Del Monte's contention.

In summation, it is concluded that Del Monte and TSA are joint employers of the petitioned-for unit of employees, and I will, therefore, order an election in the stipulated appropriate unit.

**C. Supervisory Status Issue**

**1. Facts Regarding Supervisory Status Issue**

Guzman started work at Del Monte in about January 2004. TSA's bill rate for Guzman is the highest among all of the employees provided by TSA to Del Monte for the tomato repack operation. The record discloses that the Guzman may possess some degree of supervisory authority. He appears to be, in part, responsible for ensuring the smooth flow of work in the tomato repack operation during the entire shift. However, it is Chabolla that determines the sequence that orders will be worked on and he thereafter tells Guzman about customer requirements so that Guzman knows what is expected. It is Chabolla and De Franco that decide when tomato repackers need to work outside of their

usual shift time in order to complete a customer order.

While Guzman appears to assign personnel to their places on the production line, his determinations appear to be made in conference with Chabolla based on both of their observations. Although Guzman oversees the workflow of the production line, Chabolla tells Guzman to adjust the placement of personnel on the line whenever Chabolla deems it necessary.

Guzman assigns tasks to the tomato repackers, and sometimes Chabolla directs Guzman to reassign certain tomato repackers be to specific tasks. Chabolla determines which job category each tomato repacker will be assigned to (i.e., sanitation and cleaning, quality assurance, and production), based on his observations of the employee's work or his previously existing knowledge of the employee's abilities. Guzman also assigns experienced tomato repackers to train the new inexperienced tomato repackers.

Chabolla's office is adjacent to the tomato repack area where he has immediate access to the repack area. Only Miller, De Franco, Chabolla, and Guzman have a key for Chabolla's office. Chabolla is regularly in contact with Guzman to get updates about the workflow and about any problems that arise, and it is Guzman's responsibility to keep Chabolla informed.

Whenever Chabolla sees a work-related issue that needs to be addressed, he informs Guzman about the issue and then Guzman addresses the issue. Sometimes, when Guzman is not present or the issue cannot wait for Guzman to be present, Chabolla tells the tomato repackers what to do to address the

issue. If General Manager Walter Miller sees an issue that needs to be addressed, he advises Chabolla or De Franco, who in turn tell Guzman so that Guzman can address it. Thus, whatever work-related problem Miller, Chabolla, or De Franco want remedied, the record demonstrates that Guzman is informed about it, and problem is remedied.

Guzman is responsible for keeping track of the arrival times of the employees, but Chabolla also keeps track by asking Guzman if employees arrived on time. Sometimes, Chabolla will personally observe if employees arrive on time. Guzman discusses tardiness issues with tomato repackers, without Chabolla being present. If a tomato repacker is having performance problems, Guzman is responsible for talking to the tomato repacker, and Chabolla is sometimes present when such a talk occurs.

The record reveals that Guzman has apparently dismissed tomato repackers without first consulting with Chabolla, and there were instances when Guzman first consulted with Chabolla before effecting the dismissal. Beside some testimony about Guzman's ability to dismiss employees, there is no record evidence regarding Guzman's authority to discipline.

Guzman, Velazquez, and occasionally Chabolla, are the only employees in the tomato repack operation that operate a pallet jack or a forklift to move product back and forth from storage to the production line. Guzman does not wash or sort tomatoes. Guzman adjusts and operates the wrapping machine, but does not feed packages into the machine for wrapping. Guzman does not pack the wrapped trays that come out of the wrapping

machine.

When Guzman is absent from work, Velazquez takes over Guzman's responsibilities. However, the record does not reveal to what degree Velazquez carries out Guzman's duties, and whether on those occasions or any other occasions, Velazquez performed any duties of a supervisor as defined in the Act. The record is deplete of information regarding Velazquez's responsibilities as an alleged supervisor within the meaning of the Act. The record only reveals that Velazquez takes on Guzman's responsibilities when Guzman is absent from work and that he has the authority operate a forklift and a pallet jack.<sup>10</sup>

## **2. Board Standards, Analysis and Conclusions Regarding Supervisory Status Issue**

Section 2(11) of the Act defines supervisors as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that Section 2(11) of the Act is to be read in the disjunctive and that possession of any one of the enumerated indicia can establish supervisory status, as long as the function is not routine or clerical in nature, but rather

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<sup>10</sup> At the end of the hearing, the Hearing Officer noted to counsel that the record may be insufficient as to the supervisory status of Velazquez. Counsel for Del Monte acknowledged the Hearing Officer's comment, and did not provide any more evidence of Velazquez' supervisory status.



requires a significant degree of independent judgment. Stephens Produce Co., Inc., 214 NLRB 131 (1974); NLRB v. Kentucky River Community Care, Inc. 532 U.S. 706 (2001). Thus, the exercise of supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, the test of which must be the significance of the judgment and directions. Opelika Foundry, 281 NLRB 897 (1986).

“A worker is presumed to be a statutory employee and the burden of proving a worker is a supervisor within the meaning of Section 2(11) of the Act falls on the party who would remove the worker from the class of workers protected by the Act.” Hicks Oil & Hickgas, Inc., 293 NLRB 84 (1989); Kentucky River Community Care, *supra*. “The Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights, which the Act is intended to protect.” Hydro Conduit Corp., 254 NLRB 433 (1981).

Based on the record presented which contains some indicia of supervisory status, and noting that Guzman did not testify, it is concluded that the record is insufficient to permit a determination as to whether Guzman is a supervisor as defined in Section 2(11) of the Act. I shall, therefore, permit him to vote in the election, subject to challenge.

As for Velazquez, the record is devoid of any evidence that Velazquez possesses any of the supervisory indicia listed in

Section 2(11) of the Act. It is the party asserting supervisory status' burden to establish the supervisory status. Ken-Crest Services, supra, citing NLRB v. Kentucky River Community Care, 121 S.Ct. 1861 (2001). In the present case, Del Monte has failed to carry its burden in this regard. Accordingly, I find that Velazquez is not a supervisor within the meaning of Section 2(11) of the Act

There are approximately 21 employees in the appropriate unit.

#### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are

employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the **Food, Industrial, and Beverage Warehouse, Drivers and Clerical Employees, Teamsters Local Union No. 630, International Brotherhood of Teamsters, AFL-CIO.**

#### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an alphabetized election eligibility list, containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in Region 21, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017, on or before

December 17, 2004. No extension of time to file the list shall be granted, excepted in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### **NOTICE OF POSTING OBLIGATIONS**

According to Board Rules and Regulations, Section 103.21, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three (3) working days prior to the day of the election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

#### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

20570. The Board in Washington must receive this request by 5 p.m., EST, on December 27, 2004.

DATED at Los Angeles, California, this 10th day  
of December 2004.

/s/Victoria E. Aguayo

Victoria E. Aguayo  
Regional Director, Region 21  
National Labor Relations Board